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IN THE

SUPREME COURT OF THE UNITED STATES

SPRING TERM, 1984

GLADSTONE T. FORD, Petitioner Pro Se

-against-

AMERICAN BROADCASTING COMPANIES, INC., MARK ROTH, CHARLES DeBARE, and EVERETT ERLICK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

54 pp

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it is error for the District Court to impose (and the Court of Appeals to affirm) the sanction of dismissal where

petitioner objected to the production of certain documents obtained from the U.S. Immigration & Naturalization Service (hereinafter "INS") in the preparation of petitioner's case against the respondents, at a deposition of petitioner on November 20, 1979 (at page 184) pursuant to Rule 26(b)(3), Federal Rules of Civil Procedure (hereinafter "FRCP"), and where respondents failed to make proper application to the District Court (Motion to Compel Answers to Oral Questions upon Deposition, Rule 37(a)(2), FRCP) specifying the documents sought to be discovered, when the respond ents knew the proper procedure required and stated such on the record of the November 20, 1979 deposition of petitioner (at page 184).

2. Whether it is error for the District Court to impose and the Court of Appeals to affirm the sanction of dismissal of

petitioner's case, in decisions dated July 1983 and January 1984 respectively, for allegedly "concealing" in 1983 information concerning law school class standing, attempts at passing the Bar examination, and certain Equal Employment Opportunity Commission documents which petitioner had turned over to respondents (or had made timely objection to producing certain documents based upon "privilege") approximately four years prior to these rulings at a deposition of petitioner on November 20, 1979 (eg. at pages 138;184;206-214; 228).

3. Whether it is error for the District Court and the Court of Appeals to omit from their consideration and fail to decide the issue of the petitioner's objection to the production of documents pursuant to the privilege exemptions

contained in the Equal Employment Opportunity Commission's processes, the Freedom of Information Act, and pursuant to Rule 26(b)(1) & (3) FRCP, where that objection is the basis of petitioner's defense against the respondents Motion for Dismissal and Sanctions and Costs.

4. Whether it is error for the District Court (affirmed by the Court of Appeals) to circumvent and/or override the privilege against disclosure of confidential communications contained in the Equal Employment Opportunity Commission's processes, the Freedom of Information Act, the Privacy Act, and petitioner's objection to the production of the INS documents pursuant to Rule 26(b)(1) & (3) FRCP, by a subpoena duces tecum of the subject documents, where all of the parties are before the Court and it can compel production of the disputed

documents through its in personum jurisdiction over the petitioner, after ascertaining the nature of the objection to producing the documents, and rule upon them pursuant to Rule 37(a)(2) FRCP, and where there is no showing of "good cause", "necessity or justification" for ordering either the subpoena or the production of the documents.

5. Whether the District Court (affirmed by the Court of Appeals) erred in attempting to coerce and intimidate the petitioner and his counsel into withdrawing his complaint by threats of egregious harm to his and their professional reputation, referral of the matter without regard to its merits to the Bar Association, imposition of burdensome ("horrendous") costs, etc., which threats were made directly to petitioner's counsel "off the record", while reserving for the record the self-serving

remarks of the District Court that: "I am certainly not seeking to bludgeon the plaintiff to drop (sic) his action" (Transcript of Judge Leval's Conference, June 10, 1983, at page 11).

6. Whether it is error for the Court of Appeals to deny petitioner's motion for an extension of time to submit appellate brief on November 15, 1983, when the brief was due November 7, 1983, where the subject matter of the extension was that a substantial portion of the record pertaining to materials obtained by the respondents from the U.S. Immigration & Naturalization Service pursuant to subpoena granted by the District Court, was missing, could not be located by the Clerk of the Court after extensive search, and was never made available to petitioner for review.

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TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. The Memorandum and Order of the District Court is also unreported. Both opinions appear in the appendix to this petition.

JURISDICTION

The United States Supreme Court's jurisdiction is invoked to review the final judgement of the U.S. Court of Appeals for the Second Circuit in the above captioned matter, dated January 24, 1984, which affirmed the final judgement of the U.S. District Court for the Southern District of New York in the above captioned matter dated July 6, 1983, dismissing petitioner's action brought under 42 U.S.C. 2000e, et seq., and 42 U.S.C. 1981. This Court has jurisdiction under United States Constitution, Article 3; 28 U.S.C. 1252 - 1258, 2350,

STATUTORY PROVISIONS INVOLVED

Rule 26(b)(1) Fed. Rules of Civ. Procedure

provides:

> Parties may obtain discovery regarding any matter not privileged, which is relevant to the subject matter involved in the pending action,....

Rule 26(b)(3) Fed. Rules of Civ. Procedure

provides:

> ...(A) party may obtain discovery of documents...otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation...only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means....

Rule 37(a)(2) Fed. Rules of Civ. Procedure

provides:

> If a deponent fails to answer a question propounded or submitted under Rules 30 or 31..., the discovering party may move for an order compelling an answer,....

Freedom of Information Act, as amended,

5 U.S.C. 552 (Public Information...) provides:

(a) Each agency shall make available to the public information as follows:....

(b) This section does not apply to matters that are-...(3) specifically exempted from disclosure by statute..., provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) eatablishes particular criteria for withholding or refers to particular types of matters to be withheld.

Privacy Act of 1974, 5 U.S.C. 552a (Records Maintained on Individuals), provides:

(b) Conditions of Disclosure - No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by or with the prior written consent of, the individual to whom the record pertains, (except)....

(d) Access to Records - (5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

Equal Employment Act of 1972, 42 U.S.C. 2000e - 5(b)- Prohibition on disclosure of charges...prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings;

penalties for disclosure of information.

> (b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved...alleging that an employer... has engaged in an unlawful employment practice, the Commission shall serve notice of the charge...on such employer, ...and shall make an investigation thereof.... Charges shall not be made public by the Commission.... If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

STATEMENT OF THE CASE

This is an action alleging racial discrimination in connection with employment, in that petitioner's former employer (respondents) gave racially motivated, unfair and inaccurate post-employment references to prospective

employers of petitioner (Blacklisting). A complaint was filed pro se in the U.S. District Court, Southern District of New York on June 7, 1978, and amended November 30, 1979, which alleged: violations of Title 7 of the Civil Rights Act of 1964, as amended, et seq; enormous damage to his career and loss of income; and named as defendants the respondents listed hereinabove.

The following material facts are not in dispute: Petitioner was employed as an attorney with respondent American Broadcasting Companies, Inc., from February 9, 1970 to June 29, 1973. Petitioner resigned his employment voluntarily. Petitioner's supervisors during said employment were respondents Charles DeBare, and Mark Roth, both attorneys. Everret Erlick was American Broadcasting Company's general counsel. During 1975 petitioner applied for a position as an attorney with the U.S. Immigration & Naturalization Service ("INS")

of the Department of Justice. By letter dated October 14, 1975 petitioner was informed by the U.S. Attorney General's office that his appointment "(had) been approved, subject to budgetary limitations and background character investigation". On November 14, 1975, Federal Bureau of Investigation ("FBI") agents interviewed Messrs. DeBare and Roth as part of the background investigation. By letter dated December 22, 1975, the INS notified petitioner that his appointment was denied as a result of "budgetary limitations". When petitioner asked for a further explanation, the INS, by letter dated June 10, 1976, stated that the selecting official decided, after reviewing petitioner's background (including the FBI investigation), that petitioner's "qualifications were not suited for the position".

This pattern of initial enthusiastic reception, followed by rejection after job references were checked, had been repeated in

petitioner's job hunting experience ever since leaving the American Broadcasting Company. Petitioner alleged that Messrs. DeBare and Roth gave the FBI (and other prospective employers) inaccurate, unfair, racially motivated employment references and that as a result his qualifications were found unsuitable to INS, as well as to many other prospective employers he had contacted prior thereto for job placement. The references from the American Broadcasting Company were clearly of paramount significance in petitioner's job search because it constituted petitioner's only salaried employment in the legal field. The substance of the FBI report is conceded by respondents to be an accurate statement of the contents of the interviews (see respondents answers to petitioner's interrogatories 4(c);13(c);23(c), filed April 10, 1980).

The respondents initially defended their references by asserting their accuracy.

However, based upon the deposition testimony June 15, 1981 and April 8, 1981 respectively, of Messrs. DeBare and Roth conceding that the employment references given by them of petitioner were inaccurate and incomplete, to the detriment of petitioner, defense counsel, in an abrupt about-face, agreed that petitioner was entitled to a good reference, but claimed that the issue was whether or not INS relied upon the references.

By Stipulation and Order dated September 11, 1978, respondents had acceded to the relief requested in petitioner's motion for a preliminary injunction (July 18, 1978) by refraining "from making statements of any kind concerning plaintiff, beyond dates of employment and position held, to any prospective employers of plaintiff who contacts the American Broadcasting Company for plaintiff's references, pending final determination of this action". Nevertheless, the

respondents violated the Stipulation and Order in giving references to the National Broadcasting Company in May or June 1979 by gratitious mention of the pending litigation as an obvious and successful effort to undermine petitioner's employment prospects by conveying the impression that he was an undesirable troublemaker (American Broadcasting Company response to plaintiff's interrogatory #24, January 2, 1980). Judge Leval refused enforcement of the stipulated order.

Despite the revelations of the respondents during the proceedings in the District Court, and notwithstanding Judge Leval's own observation during conference in connection with a proposed settlement of the action, that based upon those admissions, the respondents could be successfully sued by petitioner, Judge Leval dismissed petitioner's case in a Memorandum and Order dated July 6, 1983,

on procedural grounds which alleged petitioner withheld certain documents during discovery. The Court of Appeals for the Second Circuit affirmed in a judgement dated January 24, 1984.

Petitioner seeks review of the Judgement and Order of the Court of Appeals, and of the District Court's Memorandum and Order, and a remand of the case to the District Court for the purposes of correcting errors of law, and procedural and due process defects in that record.

ARGUMENT

1. Petitioner is accused by the District Court, in its Memorandum and Order dismissing petitioner's case, dated July 6, 1983 (at pages 6,7), of "failing to produce material that is damaging to his case". Specifically, information concerning:

(1) law school class standing; (2) attempts at passing the Bar examination, and (3) a certain Equal Employment Opportunity Commission ("EEOC") report (61 pages). However, all of the information in items (1) and (2) above, that petitioner is accused by Judge Leval of withholding in July 1983, was in the possession of the respondents during the course of the November 20, 1979 taking of petitioner's deposition (see pages 138;184; 206-214;228 0 Deposition of G. Ford, November 20, 1979). It is the very same information which was obtained by the respondents through the subpoena duces tecum served upon the INS, October 15, 1981 (except for sixty-one pages of the EEOC report).

Accordingly, the respondents had in their possession in 1979 nearly all of the documents that Judge Leval used as a basis for dismissing petitioner's case in 1983 because petitioner allegedly withheld/concealed them.

The remaining documents were the subject of an objection based on the privileges contained in the Equal Employment Opportunity Commission's Rules and Regulations, the Freedom of Information and Privacy Acts nondisclosure of confidential communications provisions, and pursuant to Rule 26(b)(1)&(3), Federal Rules of Civil Procedure ("FRCP"), (see Local 2047, AM Federation of Government Employees v. Defense General Supply Center, DC. Va. 1976, 423 F. Supp. 481). This objection is stated on the record and discussed with respondent's counsel, Ronald Green, in the November 20, 1979 deposition of petitioner, at page 184. The subject sixty-one pages alleged by the District Court to be undisclosed, consists of a transcript of the EEOC hearing, and the EEOC Investigator's Report furnished November 3, 1977 pursuant to petitioner's Freedom of Information/Privacy Act request directed to the INS. Petitioner made the request for the express purpose of obtaining from the INS through the EEOC/Freedom of Information/

Privacy Act processes, information as to whether the respondents had influenced the INS decision not to hire petitioner through the use of negative references. Petitioner gathered these materials for the purpose of preparing for the litigation instituted against the respondents in June 1978. All of the materials obtained by petitioner were turned over to the respondents (except for the subject sixty-one pages) prior to the taking of petitioner's deposition on November 20, 1979. At the November 20, 1979 deposition petitioner objected to the production of the remaining documents (sixty-one pages) based on privilege after disclosing their existence, and Ronald Green, respondents' counsel, stated on the record, that he would move the Court for an order compelling the production of those documents at pages 183 and 184. Respondents' counsel, Ronald Green, <u>has never moved the Court to compel the production of the INS documents</u> (see Respondents Motions to Compel

Discovery, dated January 28, 1980 and October 14, 1981).

Throughout the subsequent proceedings in the District Court, petitioner maintained silence with respect to these documents because, their existence having been disclosed to respondents, and an objection having been placed upon the record, it was then the responsibility of the respondents to properly move to compel their production.

> The party seeking discovery, rather than the objecting party is made responsibile for invoking judicial determination of discovery disputes not resolved by the parties (Depositions and Discovery (Notes) FRCP, West Publishing Company, 1982 edition, page 67).

The basic mistake of law inherent in the Court of Appeals affirmation of the District Court's dismissal of petitioner's case under these circumstances, is that once the objection to produce the INS documents was made,

based on privilege, the means to overcoming that objection is through a Rule 37(a)(2) FRCP motion, but the objection and the matter to be produced must be specified in any such motion to compel discovery. Respondents have failed to meet the requirements of the rule despite their stated awareness of the requirements (Deposition of G. Ford, November 20, 1979, page 184, line 14).

It must be said that some question exists whether the adverse party may require that information obtained either in anticipation of litigation, or in preparation for trial, be disclosed on pre-trial examination (Federal Civil Procedure, CJS Sec. 623). Moreover, the issue of law regarding a Rule 26(b)(1)&(3) FRCP objection to the production of documents based upon privileged trial preparation materials is recognized by the District of Columbia Bar Association as one

of the most important issues to be reviewed and decided by the U.S. Supreme Court in the forthcoming term (District of Columbia Bar Newsletter dated February 3, 1984).

2. It constitutes reversible error for the Court of Appeals and the District Court to have failed to address, consider or rule upon the issue of petitioner's "privilege" objection to the production of the INS documents. Said documents were obtained in preparation for, and in fact were used in connection with, the instant litigation. The objection was made by petitioner in accordance with the requirements of Rule 26(b)(1)&(3). Respondents failed to follow the method prescribed in Rule 37(a)(2) for compelling production of the INS documents. The District Court did not at any time during the proceedings below promulgate an order specifying the production of these documents prior to invoking the extreme sanction of dismissal. The Rule

26(b)(1)&(3) objection is the basis upon which the entire defense of petitioner to the respondents motion to dismiss was grounded. The omission from their consideration and failure to decide the issue of petitioner's Rule 26(b)(1)&(3) objection in both the Court of Appeals and the District Court undermined the foundation of petitioner's defense and made the result predictable. Therefore, the failure to consider or rule upon the issue by both courts represents a denial of due process in that petitioner was not afforded his day in court.

Fairness, procedural due process, and the FRCP (Rule 37(a)(2) all require that before the extreme sanction of dismissal is imposed, the Court must provide the party who objected to the production of the documents with a specific direction, ie., notice, that the disputed documents must be produced before imposition of the severest sanction - dismissal.

3. Petitioner objected to the production of the INS documents sought by respondents during the course of respondents' deposition of him in November 1979. Respondents, instead of making a motion to compel production of the subject documents pursuant to Rule 37(a)(2), and in accordance with Mr. Green's statement in the November 20, 1979 deposition at page 184, waited two years until October 15, 1981, and then persuaded the District Court to grant them permission to obtain the same information which was the subject of the "privilege" objection at the November 1979 deposition two years before without a showing of "good cause", or "necessity or justification" pursuant to the doctrine described in Hickman v. Taylor (329 U.S. at 509-510).

In its Memorandum and Order, the District Court attempts to rationalize the circumvention of the privilege objection by ordering the subpoena of the INS documents, and repair the abject failure of the respondents to make

the proper motion specifying the documents sought, when they knew of the existence of said documents, by suggesting that petitioner, in effect, should have known (ie. presumed) that the documents came under the ambigious phrase in the respondents document demand "efforts to obtain employment or the results thereof" (Memorandum and Order, p.5, July 6, 1983 (PNL). To impose such a presumption of law on petitioner, under the circumstances, represents a clearly radical departure from the requirement of Rule 37(a)(2) by the District Court. To premise dismissal of his case upon such a departure from the requirements of Rule 37(a)(2) effectively denies petitioner his day in court.

4. The District Court flagrantly abused its discretion, and overstepped the bounds of propriety by threatening the petitioner, an attorney, and an administrative law judge, through his counsel with the prospect of a published decision so egregious that it might

well destroy his career totally; constitute a threat against the continuance of his immediate employment; referral of the decision and its contents to the Bar Association; imposition of burdensome costs, all impliedly with wanton disregard for the truth or accuracy of the contents of said charges. The abovementioned threats were made to petitioner's counsel in connection with the District Court's attempt to coerce the petitioner into withdrawing his complaint. Shortly thereafter, petitioner's counsel withdrew from the case because of the remarks made by the District Court which they characterized as "frightening". The District Court then published the threatened decision. I submit that the foregoing constitutes an abuse of discretion and gross unfairness in the handling of this matter in derogation of the standards of the fair administration of justice.

Moreover, the excessive language of the District Court which cast aspersions upon petitioner's integrity; made insulting personal references, including namecalling, derogatory epithets, and moral criticisms, represents a serious departure from the language customarily employed by courts in describing parties before them.

Additionally, the Disrtict Court's accusations of misconduct represents a further effort to "hold this plaintiff's feet to the fire", and coerce petitioner into withdrawing his complaint. These accusations are based upon answers to deposition questions taken out of context, and which are largely irrelevant under circumstances where petitioner had made a prior objection, on the record, to the production of the subject documents, and was not given an opportunity to explain the apparent inconsistent statements before the

District Court dismissed petitioner's case.

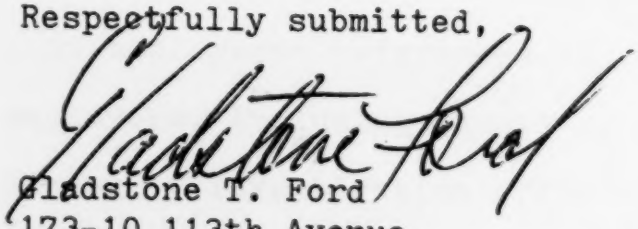
5. Petitioner was not afforded a reasonable opportunity to prepare his brief to the Court of Appeals. Petitioner applied for an extension of time to prepare his brief two weeks prior to the date due, November 7, 1983, because a substantial portion of the record on appeal was unavailable for review in the preparation of petitioner's appeal. However, petitioner did manage a submission within the due date, despite the fact that he was not noticed until November 15, 1983 that his motion was denied retroactively. No allowance in time was made for the delay in notifying petitioner.

CONCLUSION

This petition for review establishes that the Court of Appeals, in affirming the District Court, has sanctioned departures from the

usual course of judicial proceedings in so many instances as to call for an exercise of this Court's power of supervision. Accordingly, based on all the foregoing reasons and other reasons the Court may find appropriate, petitioner applies to this Court for redress, including but not limited to, vacatur of the District Court's Memorandum and Order dated July 6, 1983, and the Judgement and Order of the Court of Appeals dated January 24, 1984, and remand the case to the District Court for further proceedings not inconsistent with the Court's order, and any other remedies the Court may deem appropriate.

Respectfully submitted,



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

GLADSTONE FORD,

Plaintiff,

-against-

AMERICAN BROADCASTING CO., INC. et al,

Defendants.

78 Civ. 2596 (PNL)

MEMORANDUM AND ORDER

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PIERRE N. LEVAL, U.S.D.J.

Defendants move pursuant to Rule 37, Fed. R. Civ. P., for discovery snactions and costs, including attorney's fees. This is a Title VII action in which plaintiff, an attorney, alleges that defendants unlawfully discriminated against him in making certain post-employment references to prospective employers, including agents of the Federal Bureau of investigation ("FBI") who were investigating his suitability for employment as an attorney in the New york regional office of the United States Immigration and

Naturalization Service ("INS"). Defendants deny the allegations and contend that, in any event, INS did not rely on their references in deciding not to hire plaintiff.

Plaintiff instituted this lawsuit in 1978 and since that time has consistently attempted to frustrate defendants' legitimate discovery demands. Defendants have twice before moved for discovery sanctions. Although I hesitated to impose sanctions, I did find on March 22, 1982 that "plaintiff's long continued failure to comply with proper discovery demands and court orders represents impermissible obstruction of the rights of defendants to prepare for trial." Ford v. American Broadcasting Companies, Inc., 78 Civ. 2596, slip op. at 2 (S.D.N.Y. March 22, 1982). Based on that finding, I entered an order precluding plaintiff from offering evidence of his law school record and LSAT scores as proof of his qualifications for the INS position. I also indicated that the court might "draw inferences unfavorable to

the plaintiff as to the content of the material not disclosed." Id.

This motion concerns additional material withheld by plaintiff from defendants. In November 1979, defendants had served a notice of deposition on plaintiff and requested that he produce at the deposition:

> All letters, memoranda, resumes, applications, documents, books, and records of every kind and description now in his possession or under his control concerning his efforts to obtain employment or other gainful occupation after he ceased employment with American Broadcasting Companies, Inc., and all such materials concerning the result of his efferts...

In December 1979, defendants moved to compel answers to oral questions and the production of documents, including "(a)ny and all documents relating to the results of

plaintiff's efforts to find employment." On January 18, 1980, I entered an order granting defendants' motion to compel and directing plaintiff to produce the requested documents within ten days.

When defendants first moved for sanctions for failure to produce those documents, plaintiff stated under oath that "with the exception of one inadvertent oversight involving a few pages of materials, and an ambiguity in one of the categories demanded, I have supplied defendants with all documents in my possession or control that are responsive to their demand." Ford affidavit of February 27, 1980, para. 3, at 2. Plaintiff's counsel also stated under oath that "the extent of his [plaintiff's] noncompliance with defendant's discovery demand was insignificant and inadvertent." Warner affidavit of Feb. 27, 1980, para 2, at 1.

At his deposition, plaintiff made similar (sic) statements. For example, when

asked "are there any documents in your custody or control or possession which you have not provided to defendants relating to the results of any efforts you have made to obtain employment," plaintiff answered "[n]one that I can remember at this moment in time." Ford deposition transcript p.399, April 28, 1980.

In October 1981, defendants served a subpoena duces tecum on the INS to produce records in its possession concerning plaintiff. Because plaintiff refused to consent to the release of those documents, defendants were required to obtain a court order, over plaintiff's objection, directing INS to disclose the records in its possession.

After reviewing the INS file, defendants filed this motion asserting that plaintiff had failed to produce approximately 138 pages of documents which had been sent to plaintiff by the INS. Plaintiff now admits that he received copies of each of the approx-

imately 61 pages of documents in the INS file which were addressed to him.

These documents obviously and unquestionably came within the discovery demand. Plaintiff's failure to produce them was wilful and in bad faith. The material is particularly damaging to plaintiff's case. The Supplemental Investigation Report which was furnished to plaintiff by INS on November 3, 1977, for example, states at 198:

> Mr. Wack indicated that he did recall the case of the complainant, specifically and that after the complainant had been selected by the Service for the job, the full-field investigation was done by the Federal Bureau of Investigation, the results of which indicated that the complainant had finished very low in his law school class and made several attempts to pass the New York Bar Examination before finally passing the Bar Exam in the District of Columbia. Mr. Wack stated that he discussed the matter with Mr. Rudnick, and it was their decision not to hire the complainant based upon his academic record.

It continues at 199:

> Mr. Rudnick stated that the decision not to hire the applicant was based solely on the information obtained in the full-field background investigation indicat-

> ing that the complainant had a poor law school academic record. Mr. Rudnick denied that the applicant's race had any bearing whatsoever on the decision not to hire him.

Sworn statements by Wack and Rudnick were attached as exhibits to the report. Those statements recite that plaintiff was not hired because of his low standing in his law school class and his failure to pass the New York bar exam. They do not advert to the references given by the defendants.

Plaintiff now contends that he withheld these documents because he believed they were not within the discovery request. He asserts first that most of the documents were sent to him by the Equal Employment Opportunity Commission in connection with a complaint he filed with the EEOC seeking redress for INS' allegedly improper refusal to hire him and that such papers do not concern his "efforts to obtain employment" or "the results" thereof. The contention is

frivolous. Furthermore, the INS file demonstrates that in fact, the bulk of the documents, including the Supplemental Investigation Report, were sent to plaintiff by INS. Even if they had been sent to him by EEOC, they would still come clearly within the scope of defendants' document requests and this court's orders. They unquestionably concern plaintiff's efforts to obtain employment. The fact that plaintiff did produce four relatively innocuous letters from INS related to his claim that INS discriminated against him is further evidence that his present claim of confusion is disingenuous.

Rule 37 authorizes a broad range of sanctions when a party fails to permit discovery or to comply with the court's discovery orders. The sanctions range from an order to reimburse the opposing party for expenses to orders striking out portions of the pleadings, prohibiting the introduction

of evidence, deeming disputed issues determined adversely to the position of the disobedient party, or rendering a default judgment against the disobedient party. Fed. R. Civ. P. 37; See Cine Forty-Second St. Theatre v. Allied Artists, 602 F.2d 1062, 1066 (2d Cir. 1979). In determining which sanction, if any, is appropriate, a court should properly consider the wilfulness of the party's behavior Cine Forty-Second St. Theatre v. Allied Artists, supra, 602 F.2d at 1066 n. 8. A dismissal is, of course, a particularly harsh sanction and should be used only when noncompliance is due to "willfulness, bad faith, or...fault." Societe Internationale Pour Participations Industrielles et Commerciales S.A. v. Rogers, 357 U.S. 197, 212, 78 S. Ct. 1087, 1096 (1958).

Although the courts should not use this severe sanction freely,

> the most severe in the spectrum of sanctions...must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such

> a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643, 96 S. Ct. 2778,2781 (1976) (per curiam).

Dismissal is particularly appropriate in this case. Plaintiff is an attorney, well aware of his discovery obligations. He has repeatedly failed to produce material that is damaging to his case. After plaintiff refused to disclose his LSAT scores and law school record, I entered an order precluding him from offering evidence of his test scores or academic record. In view of the nature of that material, it is evident that his refusal to produce it was in bad faith and without justification. The INS documents refer in several places to plaintiff's low academic standing (he ranked 191 out of a class of 209 at Fordham Law School) as a reason for the decision not to hire him as a staff attorney. The circumstances

establish that plaintiff's failure to reveal this material was because of his accurate perception that it would furnish his adversary with evidence that was devastating to his case. He fought the enforcement of the subpoena to the INS for the same reason, as well as to conceal his misconduct.

There is no question that a court should exercise prudence, caution, and leniency before punishing violations of rules with sanctions so extreme as to deny a litigant the effective opportunity to have his case heard. Courts also must be wary lest laziness, incompetence or lack of interest on the part of the legal representative unfairly victimize a client who chooses his lawyer without sophistication or advantage. The sins or omissions of lawyers should not mechanically be visited on the client, especially where the result would be to undermine the usefulness and

fairness of our legal and judicial system.

None of those considerations are applicable here, however. Plaintiff is not an unsophisticated man victimized by the infidelity or lack of diligence of his lawyer. Plaintiff is himself a lawyer. The failures of disclosure were his own, not those of his lawyer. And most important, those failures are not the result of oversight, negligence, lack of interest, confusion or incompetence. They result from plaintiff's own bad faith and dishonest conduct, his deliberate and selestive attempt to decieve by concealing evidence which he well knows would be powerfully damaging to his lawsuit. This constitutes an attempt to obstruct justice. See In re Perkins, N.Y.L.J., July 20, 1979 (attorney jailed for contempt and severely censured for failure to disclose documents). Compounding the dishonesty of the concealment of properly demanded discovery has

been plaintiff's further dishonesty in furnishing false and deceitful affidavits and testimony on the subject.

I conclude that this case is significantly more deserving of extreme sanctions than Cine-Forty Second St., supra, where there was no issue of dishonesty, concealment or obstruction of justice by the party but of "gross negligence" of counsel, tantamount to willfulness.

Furthermore, lesser sanctions on these facts would be ineffectual and would virtually encourage the dishonest practices by which plaintiff has imposed on his adversaries.

I have also considered whether it would be sufficient and more appropriate sanction to deem affected issues conclusively determined against plaintiff and to permit the action to proceed on other questions. I find this would not be appropriate in the

circumstances of this case. Were I to determine conclusively that the INS decision not to hire plaintiff was not based on defendant's references, it would be a sham and an imposition on all parties to allow the litigation to go forward. Courts should of course bend over backwards to allow a fair opportunity to disadvantaged litigants. It does not follow that courts should permit dishonest and contemptous practices to abuse the court processes.

The action is dismissed.

SO ORDERED:

Dated: New York, New York
July 6, 1983

(signed)

Pierre N. Leval
U.S.D.J.

(pro se office 791-1054)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of January, one thousand nine hundred and eighty-four.

PRESENT: HONORABLE THOMAS J. MESKILL,
HONORABLE JON O. NEWMAN,
HONORABLE GEORGE C. PRATT,
Circuit Judges

GLADSTONE T. FORD, Plaintiff-Appellant, v. AMERICAN BROADCASTING COMPANIES, INC., MARK ROTH, EVERETT ERLICK, AND CHARLES DeBARE, Defendants-Appellees.	Docket No 83-7797

This is an appeal from an order of the United States District Court for the Southern District of New York, Leval, J., dismissing plaintiff-appellant's complaint as a sanction pursuant to Fed. R. Civ. P. 37.

This cause came on to be heard on the transcript of record from the said district court and was argued by appellant pro se and by counsel for the appellees.

Ford's notice of appeal was not filed until September 20, 1983 and may well be untimely. He returned a notice of appeal form to the pro se office of the district court on July 20 without either a docketing fee or an affidavit of poverty. We question whether the return of that form satisfied the requirement of filing a notice of appeal with the district court, but under the circumstances we will entertain the appeal and adjudicate the merits.

Considering Mr. Ford's conduct during this litigation the district court did not err in concluding as a matter of law that plaintiff-appellant violated the district court's order compelling the production of documents when he impermissibly withheld and/or concealed from defendants-appellees evidence damaging to his case. It was not an abuse of discretion to afford plaintiff-appellant an opportunity to resolve his civil action prior to issuance of the district court's memorandum and order. Furthermore, the district court did not abuse its discretion by invoking the sanction of dismissal under Fed. R. Civ. P. 37.

The judgement of the district court is affirmed.

(signed)

Thomas J. Meskill, U.S.C.J.

(signed)

Jon O. Newman, U.S.C.J.

(signed)

George C. Pratt, U.S.C.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

The following are excerpts from the November 20, 1979 Deposition of G. Ford. The person conducting the deposition and asking the questions is Ronald M. Green, defendants' counsel:

G. Ford Deposition, November 20, 1979,

page 138- Ques. Would you then reveal to them (prospective employers) under such a circumstance that you spent five years in law school?

Ans. I gave them -- I responded to the questions. I gave them the dates that I attended the respective institutions that I did attend.

Ques. Did you tell them your difficulties in passing the Bar examination?

Ans. They did not ask.

page 181- Ques. Were you in fact told by that government agency that you were not

hired because of budgetary restrictions?

Ans. That's one of the phrases they used that I viewed as a euphenism and fake.

Ques. Did anyone at that government agency ever tell you that you were not hired because you got a bad reference?

Ans. No, not directly.

<u>G. Ford Deposition, November 20, 1979</u>, page 183- Ques. ...(I) ask you if you were provided any documents beyond those three (summaries of Roth and DeBare interviews with FBI agents) in response to your FOIA request?

Ans. Yes.

Ques. Where are they?

Ans. In my possession.

Ques. May we see them?

Ans. Those documents subject to a privilege.

Ques. What privilege is that?

Ans. It is contained in the Freedom of Information Act.

...Ques. ...Now, may we examine the documents that was provided you by the Department of Justice?

Ans. No.

Ques. Your answer is no?

Ans. For the record, no.

Ques. Were there documents in that file which reflected the results of interviews conducted by the FBI of other personnel and/or personal references you gave?

Ans. (No response)

Ques. Are you refusing to answer the question?

Ans. It is a privileged matter. I stand on the privilege.

Ques. What privilege?

Ans. I told you the documents are privileged.

Ques. What privilege?

Ans. Contained in the Freedom of

Information Act.

Ques. You understand that we are going to move to compel you to answer that question?

Ans. You do as you wish, of course.